91-225

Supreme Court, U.S.
FILED
JUL 11 1991
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NO. _____

THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MARTIN P. RUBIN, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

MICHAEL D. KIMERER (COUNSEL OF RECORD)
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ATTORNEYS FOR PETITIONER

## QUESTIONS PRESENTED FOR REVIEW

1. Is the evidence insufficient to sustain a conviction for wire fraud under 18 U.S.C. § 1343 when the government alleges by date and time a specific telephone call for each count of the indictment but fails to prove either the parties to or the content of each call.

2. Does 18 U.S.C. § 1343 require proof of the content of the wire communications alleged in support of an indictment where that indictment allege a specified and particular phone call as the basis for each of twenty-four counts of the indictment.

3. Is due process violated by a conviction on an indictment such as is described in question 2 when there is no proof or showing of the content of any of the alleged telephone calls.

## PARTIES TO THE CASE

The Plaintiff in this matter is the United States of America, represented by the United States Attorney for the District of Arizona.

The Defendants in addition to Petitioner, are:

Wilbur Swift, represented by Thomas Henze, Phoenix, Arizona; and

Leroy Rimbach, represented by Barbara Reinecke, Encino, California.

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## OPINION BELOW

The United States Court of Appeals for the Ninth Circuit issued a non-published, memorandum opinion affirming the judgment and sentence of the United States District Court for the District of Arizona. The defendants had filed a joint brief in the Court of Appeals and the Court issued a consolidated opinion under three separate docket numbers. The docket number for Petitioner Rubin was Court of Appeals No. 89-10530. This opinion may be found in the Appendix to this petition, at 19.

## STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed October 26, 1990. Petitioner Rubin requested rehearing and suggested rehearing en banc,

which request was denied by order dated April 12, 1991. (See Appendix, p. 22). This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST., AMEND V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses,

representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or received therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

## STATEMENT OF THE CASE

Marty Rubin (petitioner herein) and Wilbur Swift were partners in a California business known as D.W. Wholesale. Their primary enterprise was wholesaling pharmaceuticals. During the course of this business, they became acquainted with Leroy Rimbach. Rimbach managed several small hospitals in the southwest, including the Northland Medical Center in Holbrook, Arizona, and Guadalupe General Hospital in New Mexico.

One facet of the wholesale pharmaceutical industry with which Rubin and Swift were involved was that of purchasing pharmaceuticals from hospitals and reselling them. This market was fueled by the drug industry's practice of tremendous price reductions to hospital buying groups. Reductions were of such a

magnitude that small wholesalers could purchase drugs from hospitals and resell them to larger wholesalers at a lower price than the large wholesaler could obtain from the manufacturer. Though later criminalized by the Prescription Drug Marketing Act of 1987, Pub.L. 100-293, § 5, 102 Stat. 97, effective 4/22/88, this secondary market for pharmaceuticals was not illegal during the time frame alleged in the instant indictment.

Rubin and Swift entered into agreements with Rimbach whereby Rimbach would join a hospital buying group (Intermountain Health Care.) Through this buying group, the hospitals owned and managed by Rimbach bought prescription drugs and other pharmaceuticals from a drug wholesaler in California called McKesson. McKesson supplied Rimbach with machines called

Econotones, through which orders could be placed telephonically directly to McKesson. These machines at all times pertinent to the indictment were kept in California and used to place orders to McKesson, also in California. Some of the orders placed were for use by the hospitals; the rest was for resale to D.W. Wholesale.

The government's indictment alleges that this re-purchasing of pharmaceuticals constituted wire fraud. The claim was that Rubin, Swift and Rimbach misrepresented to Intermountain and/or McKesson that the drugs ordered over the Econotone were for non-profit hospitals and for those hospitals' own use. While the "non-profit" requirement was stated in the Intermountain contract with Northland Medical Center (a for-profit hospital,) a

representative of Intermountain testified at trial that for-profit hospitals could also join the group. In fact, Guadalupe General was known by Intermountain to be for-profit, and was allowed to join.

The "own use" requirement, which the government focused on as its primary proof of misrepresentation, was not included in any of the contracts between Northland and Intermountain.

The re-purchasing plan of the three co-defendants was instituted in August of 1985. Rimbach placed the Econotone from Northland in D.W. Wholesale's offices in California. Northland would call D.W. from Arizona to inform D.W. what it needed. D.W. would place an order over the Econotone for Northland, and include other orders for resale. The merchandise would be shipped by McKesson to Northland,

where the items needed by the hospital would be unpacked. The rest would be shipped on to D.W.

Though McKesson noticed in June of 1986 that Northland seemed to be ordering more pharmaceuticals than it should need, it did not stop shipping to Northland. It was only later, when an Arizona inspector from the Board of Pharmacy inspected records of Northland that any law enforcement attention was drawn to the situation. On December 7, 1988, a grand jury returned the indictment in this case. (See Appendix, at 23.)

That indictment alleges in twenty-four counts that Petitioner and his co-defendants, from October, 1985, through March, 1987, committed wire fraud in violation of 18 U.S.C. §§ 2 and 1343. Each count alleges a specific telephone

call from a number at Northland Medical Center in Arizona to a number at D.W. Wholesale in California. Each count lists a specific date and time of the call. The indictment attempts to tie each call to an invoice from McKesson to Northland; however, this attempt is flawed in that many of the invoices precede the telephone call. For example, count one alleges a call on 10/25/85 at 10:25 a.m. This call from Northland to D.W. supposedly generated an order from D.W. to McKesson and a shipment from McKesson to Northland. However, the invoice listed in the indictment by the government for count one is from 10/23/85, two days before the phone call. The government never explained at trial the connection it claimed between these events.

The government also never showed at

trial who made the twenty-four phone calls or what was discussed. Only two witnesses testified to making phone calls from Arizona to California to order pharmaceuticals, but by their own testimony neither one could have (or did) make the calls alleged in the indictment. Nevertheless, motions for a directed verdict were denied and the jury returned verdicts of guilty on June 30, 1989.

All the defendants timely appealed. The Ninth Circuit Court of Appeals affirmed and denied motions for rehearing. Because this decision squarely conflicts with other decisions of the Court of Appeals for the Ninth Circuit, and with decisions of other Courts of Appeal, and because this aspect of 18 U.S.C. § 1343 has never been addressed by this Court, this petition follows.

## ARGUMENT

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF ITS OWN AND OTHER COURTS OF APPEAL.

No evidence has ever been produced in this case which establishes the parties to or the contents of the twenty-four specific telephone calls alleged by the government as the basis of the twenty-four counts in the instant indictment. Neither at trial, in the appellate briefs, nor at oral argument was the government able to answer the question of who made the calls, or what was the content of the calls.

The only evidence of anybody who made telephone calls from Northland Medical Center to D.W. Wholesalers, were two nurses, Lucy Gasaway and Sally Tye Deck. Ms. Deck testified that she placed orders by phone only for three weeks in August of

1986. None of the counts alleged in the indictment concern any phone call in August, 1986. Ms. Gasaway testified that she placed orders from July of 1986 to January of 1987. Only one count, count 23, occurred during this period of time. The indictment on count 23 specifically alleges that the call was placed at 11:31 a.m. Ms. Gasaway testified that she only worked evenings and was not at Northland Medical Center during the day. Thus, she could not have placed the phone call alleged in count 23. There was no other evidence of phone calls being placed from Northland Medical Center to D.W. in the record. Accordingly, the government did not prove the content of the phone calls alleged. It is a denial of due process for a conviction to be based on a dearth of evidence such as was present in the

case at bar.

The Second[1], Sixth[2] and Ninth[3] Circuits of the Courts of Appeal have held that the government must prove the content of a specifically alleged wire communication to sustain a wire fraud conviction under 18 U.S.C. § 1343. Petitioner has found no decisions (save the instant one) which hold otherwise, nor has any such opinion been cited by the government or by the lower courts. The decision in this case stands in stark contrast to all precedent and should be reviewed.

[1] United States v. Bibby, 752 F.2d 1116 (6th Cir. 1985), cert. denied 475 U.S. 1010 (1986)

[2] United States v. DeFiore, 720 F.2d 757 (2nd Cir. 1983), cert. denied sub. nom. Coppola v. United States, 466 U.S. 906 (1984)

[3] Osborne v. United States, 371 F.2d 913 (9th Cir.), cert. denied 387 U.S. 946 (1967).

## II. AS 18 U.S.C. § 1343 CRIMINALIZES AN OFTEN INTANGIBLE COMMUNICATION, GUIDANCE IS NEEDED AS TO THE QUANTUM OF PROOF REQUIRED.

The requirement that the government prove the content of wire communication in prosecutions for violations of 18 U.S.C. § 1343 is vital to an orderly administration of justice because wire communications are, by their very nature, intangible. The power of the federal government ought not to be invoked lightly nor over ephemeral wrongs. In prosecutions under 18 U.S.C. § 1341, mail fraud, the government has tangible, physical proof of the mailing - it has the item mailed. Thus there is no parallel line of cases to DeFiore, Bibby, and Osborne delimiting the reach of 18 U.S.C. § 1341 as to proof of the content of mailings. In wire fraud cases, however, the lower courts need guidance on the

reach of 18 U.S.C. 1343 with regard to what the government must show as to the content of the alleged communications. This Court has never addressed this dilemma. The instant case provides a clear evidentiary basis upon which this Court can analyze the issue.

The decision below aptly demonstrates this need. The court rejected Petitioner's contentions, citing Schmuck v. United States, 489 U.S. 705 (1989). Schmuck was a prosecution under 18 U.S.C. 1341, and involved the question whether certain mailings were sufficiently connected to a fraudulent scheme to satisfy the mailing requirement of § 1341. It had nothing to do with whether the government had proved the contents of a mailing. The court below ignored its own precedent (Osborne) as well as that of

other circuits. This Court should rigorously examine just what proof is required in a wire fraud case, and should do so with an eye towards the caveat first explained nearly fifty years ago in Kann v. United States, 323 U.S. 88, 95 (1944):

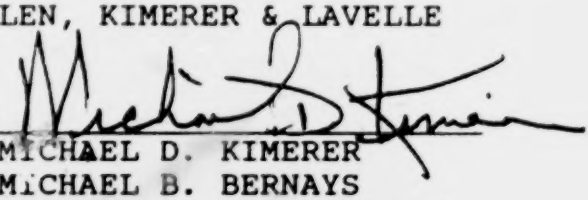
> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.

The same is true as to wire fraud. In this day and age of telecommunication overload, both broadcast and wire, the sweep of 18 U.S.C. § 1343 would be beyond Congressional intent if construed to require only proof of some use of a telephone without proof of the content of any such use. This Court has a duty to construe this statute, and the proof

required thereunder, so as to provide guidance both to lower courts and to litigants on both sides of the issue. Petitioner therefore urges the Court to grant this petition and issue the Writ of Certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

ALLEN, KIMERER & LAVELLE

By 

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NO. _____

THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MARTIN P. RUBIN, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEROY T. RIMBACH, SR., Defendant-Appellant. | CA NO.89-10435 DC NO. CR-88-0366-EHC |
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARTIN P. RUBIN, Defendant-Appellant. | CA NO.89-10530 DC NO. CR-88-0366-EHC MEMORANDUM* |
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILBUR SWIFT, Defendant-Appellant. | CA NO.89-10551 DC NO. CR-88-0366-EHC |

Appeal from the United States
District Court for the
District of Arizona

Earl H. Carroll
District Judge, Presiding
Argued and Submitted
September 11, 1990
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: CHOY, FARRIS, and THOMPSON, Circuit Judges.

We understand but reject the defendants' argument that there was lack of sufficient evidence (1) of the content of each interstate telephone call, (2) that the calls were in furtherance of a scheme, and (3) that any misrepresentation was material. There is no doubt that the government elected to specify the telephone calls upon which it relied. Whether those calls were personal calls or in furtherance of the scheme was a question for the trier of fact. In analyzing the sufficiency of the evidence, our review questions whether any rational trier of fact could have found the essential elements of the crime from the evidence adduced beyond a reasonable doubt. We are required to view the

evidence in the light most favorable to the government. See Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Goode, 814 F.2d 1353, 1355 (9th Cir. 1987). We have carefully reviewed the record and applicable precedent and have listened to argument of counsel. There was sufficient evidence, both direct and circumstantial, to support the verdict. See United States v. Schmuck, 489 U.S. 705 (1989); Pereira v. United States, 347 U.S. 1 (1954).

The district court is not required to make formal findings of fact concerning the factors considered in awarding restitution. United States v. Cloud, 872 F.2d 846, 855 (9th Cir.), cert. denied, 110 S.Ct. 561 (1989). The court may rely on evidence presented in court or in the presentence report if proved in the latter

by a preponderance of the evidence. As to Rimbach, the court assessed restitution at the lowest of his own assessment. As to Swift and Rubin, restitution was based on the total amount of discount received as a result of purchasing in Northland's name.

The defendants argue that McKesson was not a victim, but their argument overlooks the ruling of the court. Restitution was to be paid to McKesson (via the Justice Department) for distribution "by them to the appropriate drug manufacturers." Restitution may properly be awarded for "all losses directly resulting from the defendant's offenses." United States v. Barany, 884 F.2d 1255, 1260 (9th cir. 1989), cert. denied, 110 S.Ct. 775 (1990). The invoices of record permit precise allocation among the manufacturers. The distribution by McKesson is therefore a

purely ministerial act.

We understand but reject the defendants' grand jury prejudice argument. See United States v. Mechanik, 475, U.S. 66, 70 (1986); United States v. Al Mudarris, 695 F.2d 1182, 1186 (9th Cir.), cert. denied, 461 U.S. 932 (1983).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEROY T. RIMBACH, SR., Defendant-Appellant. | CA NO.89-10435 DC NO. CR-88-0366-EHC |
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARTIN P. RUBIN, Defendant-Appellant. | CA NO.89-10530 DC NO. CR-88-0366-EHC ORDER |
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILBUR SWIFT, Defendant-Appellant. | CA NO.89-10551 DC NO. CR-88-0366-EHC |

Before: CHOY, FARRIS, and THOMPSON, Circuit Judges.

The order filed January 23, 1991, is

corrected to include denial of the petition for rehearing and rejection of the suggestion for rehearing en banc filed by appellant Rubin in 89-10530.

[This order filed April 12, 1991]

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>MARTIN P. RUBIN, WILBUR SWIFT, and ROY RIMBACH,<br><br>Defendants. | ) | No. CR-88-366-PHX<br><br>INDICTMENT<br>VIO: 18 U.S.C. 1343, (Wire Fraud) 24 Counts |

THE GRAND JURY CHARGES:

COUNTS I - XXIV

1. From approximately October 1985 through March, 1987, within the District of Arizona and elsewhere, defendants MARTIN P. RUBIN, WILBUR SWIFT and ROY RIMBACH did devise and intend to devise a scheme and artifice to defraud, and for obtaining money and property from McKesson Drug Company and its pharmaceutical product suppliers and manufacturers and Northland Medical Center, by means of

false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations and promises would be and were false and fraudulent when made.

Introduction

2. At all times material herein:

a. Defendant ROY RIMBACH, was owner/operator of Southwest Health Management, a company specializing in hospital management, with business offices located at 11156 South Mt. Vernon Avenue, Colton, California.

b. Northland Medical Center was a 12-bed rural hospital located in Holbrook, Arizona which was being managed by Southwest Health Management and purchased pharmaceutical products from McKesson Drug Company.

c. McKesson Drug Company was a

distributor of pharmaceutical products acquired from various suppliers and manufacturers who maintained a pricing policy through which hospitals, such as Northland Medical Center, could acquire pharmaceutical products at a substantial discount not available to certain other purchasers, including D.W. Wholesale.

d. Defendants MARTIN P. RUBIN and WILBUR SWIFT, were owners/operators of D.W. Wholesale, a company specializing in the distribution of pharmaceutical products, located at 16154 Wyandott Street, Van Nuys, California.

The Scheme

3. From approximately October, 1985 thru March, 1987, pharmaceutical products sold by McKesson Drug Company to Northland Medical Center in Holbrook, Arizona, (at a discounted hospital price) were unlawfully

diverted by defendants from that medical facility to D.W. Wholesale in California for resale.

4. It was a part of the aforesaid scheme and artifice to defraud that defendants directed and caused;

a. Northland Medical Center to represent to McKesson Drug Company that it was in need of purchasing pharmaceutical products for use at the hospital and orders for said products were then placed directly by Northland Medical Center to McKesson Drug Company. After a period of time, however, the equipment used to telephonically place such orders was physically transferred by defendants from Northland Medical Center in Arizona to D.W. Wholesale in California, and the ordering of pharmaceutical products for Northland Medical Center then actually

initiated at D.W. Wholesale. This action resulted in Northland Medical Center in Holbrook, Arizona having to telephonically contact D.W. Wholesale in Van Nuys, California whenever it became necessary to order pharmaceutical products for patients being treated at its facility.

b. McKesson Drug Company would then ship the pharmaceutical order to Northland Medical Center, where hospital staff would separate products ordered for use at Northland Medical Center from that to be shipped on to D.W. Wholesale.

c. Hospital staff then utilized United Parcel Service to ship pharmaceutical products ordered for use by D.W. Wholesale.

d. By virtue of defendants' scheme, D.W. Wholesale was then able to acquire pharmaceutical products from

McKesson Drug Company at a discount price to which it was not entitled thereby increasing defendants' profits and defrauding McKesson Drug Company, its suppliers and manufacturers of their rightful profit margin.

e. In addition, by virtue of defendants' scheme, Northland Medical Center was defrauded through defendants' use of Northland Medical Center staff to facilitate the scheme during paid working hours and thereby depriving Northland Medical Center of the services of said staff during those hours.

5. On or about the following dates, within the District of Arizona, and elsewhere, defendants MARTIN P. RUBIN, WILBUR SWIFT, and ROY RIMBACH, for the purposes of executing the aforesaid scheme and artifice to defraud, did transmit and

cause to be transmitted by means of wire communications in interstate commerce, certain signs, signals and sounds, to wit, telephone calls between the states of Arizona and California regarding the purchase of pharmaceutical products as set forth below:

| Count # | Date and Time of Interstate Communication | McKesson Invoice Date |
|---|---|---|
| I | 10-25-85/10:25A | 10-23-85 |
| II | 11-15-85/10:45A | 11-13-85 |
| III | 11-21-85/10:06A | 11-19-85 |
| IV | 11-21-85/03:08P | 11-19-85 |
| V | 12-30-85/03:47P | 12-31-85 |
| VI | 01-03-86/11:44A | 03-04-86 |
| VIII | 03-04-86/02:32P | 03-04-86 |
| IX | 03-04-86/02:35P | 03-04-86 |
| X | 03-05-86/02:31P | 03-04-86 |
| XI | 03-06-86/03:36P | 03-04-86 |
| XII | 03-11-86/11:38A | 03-12-86 |

| | | |
|---|---|---|
| XIII | 03-11-86/01:01P | 03-12-86 |
| XIV | 04-16-86/03:58P | 04-17-86 |
| XV | 04-17-86/04:15P | 04-17-86 |
| XVI | 04-18-86/10:19A | 04-17-86 |
| XVII | 04-18-86/01:10P | 04-17-86 |
| XVIII | 06-03-86/01:24P | 06-03-86 |
| XIX | 06-03-86/05:34P | 06-03-86 |
| XX | 06-04-86/08:17A | 06-03-86 |
| XXI | 06-04-86/09:30A | 06-03-86 |
| XXII | 06-05-86/02:53P | 06-03-86 |
| XXIII | 12-04-86/11:31A | 12-04-86 |
| XXIV | 03-06-87/01:58P | 03-04-87 |

| Count # | UPS SHIPPING DATE | HOSPITAL COST OF PURCHASE |
|---|---|---|
| I | 10-24-85 | $2,593.30 |
| II | 11-14-85 | $3,549.29 |
| III | 11-21-85 | $15,150.45 |
| IV | 11-21-85 | $15,150.45 |
| V | 01-02-86 | $11,415.42 |
| VI | 01-02-86 | $11,415,42 |

| | | |
|---|---|---|
| VII | 03-05-86 | $6,656.70 |
| VIII | 03-05-86 | $6,656,70 |
| IX | 03-05-86 | $6,656.70 |
| X | 03-05-86 | $6,656.70 |
| XI | 03-05-86 | $6,656.70 |
| XII | 03-12-86 | $9,741.56 |
| XIII | 03-12-86 | $9,741.56 |
| XIV | 04-17-86 | $3,625.13 |
| XV | 04-17-86 | $3,615.13 |
| XVI | 04-17-86 | $3,625.13 |
| XVII | 04-17-86 | $3,615.13 |
| XVIII | 06-04-86 | $3,855.10 |
| XIX | 06-04-86 | $3,855.10 |
| XX | 06-04-86 | $3,855.10 |
| XXI | 06-04-86 | $3,855.10 |
| XXII | 06-04-86 | $3,855.10 |
| XXIII | 12-05-86 | $3,609.05 |
| XXIV | 03-06-87 | $8,548.59 |

All in violation of Title 18, United States Code, Sections 1343 and 2.

A TRUE BILL

_____
FOREMAN OF THE GRAND JURY
Date: 12/7/88

STEPHEN M. McNAMEE
United States Attorney
District of Arizona

_____
Assistant U.S. Attorney